BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENNIS BOHANNON	)	
Claimant	)	
VS.	)	
	)	Docket No. 230,500
DYNAMIC DRYWALL	)	
Respondent	)	
AND	)	
	)	
AMERICAN FAMILY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The claimant appealed the March 31, 1999 Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument in Wichita, Kansas, on September 10, 1999.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for the claimant. William L. Townsley III, of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Appeals Board the parties stipulated that claimant would be entitled to receive permanent partial disability benefits for an 18.05 percent functional impairment to the left upper extremity in the event this claim is found compensable.

ISSUES

This is a claim for a December 10, 1997 accident and resulting injury to the left arm. Considering the results of a drug screen that was administered shortly after the accident, the Judge found that claimant's marijuana use contributed to the accident and, therefore, denied the request for benefits. The Judge found the drug screen results were admissible as the respondent had probable cause to believe that claimant had either used or was

impaired by drugs or alcohol at the time of the accident. In deciding that probable cause existed, the Judge found: (1) that respondent knew claimant reported to work on one occasion smelling of alcohol and (2) that the respondent knew how the accident occurred. Additionally, the Judge found that the drug screen satisfied other statutory requirements that were necessary before the results were admissible.

Claimant contends the Judge erred by admitting the drug screen results into evidence. Claimant argues that (1) the respondent lacked probable cause to believe that he was impaired at the time of the accident or that he had used drugs or alcohol on that date, (2) the test sample was neither collected nor labeled by a licensed health care professional, as required by statute, and (3) the respondent failed to prove beyond a reasonable doubt that the test results were from the test sample taken from the claimant, also as required by statute.

Conversely, the respondent and its insurance carrier contend the award denying benefits should be affirmed. They argue that claimant's use of drugs contributed to the accident and that the results of the drug screen were properly admitted into evidence.

The issues before the Appeals Board on this appeal are:

1. When it ordered the drug screen, did the respondent have probable cause to believe that claimant had used, had possession of, or was impaired by drugs or alcohol at the time of the accident?

2. When doing a drug screen, is a licensed health care professional required to collect and label a test sample or is it sufficient that the person collecting and labeling the sample is authorized to perform those tasks by a licensed facility?

3. Did the respondent and its insurance carrier prove beyond a reasonable doubt that the drug screen test results were from the test sample taken from claimant?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Shortly after lunch on December 10, 1997, Dennis Bohannon fell from a ladder that he had placed upon a scaffold in order to tape and finish drywall at the top of a ceiling. As Mr. Bohannon worked his way down the ladder, the scaffolding moved away from the wall causing him to fall and injure his left arm. The accident arose out of and in the course of Mr. Bohannon's employment with Dynamic Drywall.

2. When Roger Roper, the owner of the company, learned that Mr. Bohannon had fallen and that he was being admitted to the hospital, Mr. Roper requested a drug screen.

When asked if he had spoken to anybody at the job site about the accident before he requested the drug screen, Mr. Roper testified:

> Just from the call, the initial call that he had fallen. I didn't have any of the real detail of it, of the fall, at that time.

It wasn't until the next morning that Mr. Roper learned how the accident occurred.

3. At approximately 6:00 p.m. on the date of the accident, Via Christi Medical Center took a urine sample from Mr. Bohannon and tested that sample in its laboratory, which is licensed with the Kansas Department of Health and Environment. But the sample was taken and labeled by an individual who was not a licensed health care professional.

4. Mr. Bohannon began working for Dynamic Drywall approximately one month before the accident. On one occasion before the accident, Mr. Roper smelled alcohol on Mr. Bohannon's breath. Before the accident, Mr. Roper had neither knowledge nor suspicion that Mr. Bohannon used marijuana.

5. The parties have stipulated that Mr. Bohannon has an 18.05 percent functional impairment to the left upper extremity as a result of the December 10, 1997 accident.

CONCLUSIONS OF LAW

1. For the reasons set forth below, the results of the drug screen test are not admissible and, therefore, should not be considered in this proceeding.

2. The Workers Compensation Act severely restricts the admission of drug screen test results. The Act provides that before the results of a drug or alcohol test can be admitted into evidence the employer must prove six factors:[1]

> (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
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> (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
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> (C) the collecting and labeling of the test sample was performed by a licensed health care professional;
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> (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of

[1] K.S.A. 1997 Supp. 44-501(d)(2).

> health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
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> (E) the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and
>
> (F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

3. The Workers Compensation Act does not define probable cause. But the Appeals Board believes in this context the phrase means having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker.[2]

4. The evidence fails to establish that Roger Roper, the owner of Dynamic Drywall and the individual who ordered the drug screen, had probable cause to believe that Mr. Bohannon had either used, had possession of, or was impaired by drugs or alcohol while at work on December 10, 1997. As indicated above, the only information that Mr. Roper possessed when he ordered the drug screen was that Mr. Bohannon had fallen and that he had shown up at work on one previous occasion with the smell of alcohol on his breath. Knowledge of those two facts alone does not constitute sufficient information to form a reasonable belief that Mr. Bohannon had either used drugs or alcohol on the day of the accident or that he was impaired when the accident occurred.

5. There is a second reason that the results of the drug screen are inadmissable. The record fails to establish that the test sample was taken by a licensed health care professional, which K.S.A. 44-501 specifically requires.

Dynamic Drywall and its insurance carrier argue that it is unreasonable for the Workers Compensation Act to require a licensed health care professional to collect and label a test sample. But the Appeals Board disagrees. In Boucher,[3] the Court held:

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[2] See Lindenman v. Umscheid, 255 Kan. 610, 875 P.2d 964 (1994) and *In re* Estate of Campbell, 19 Kan. App. 2d 795, 876 P.2d 212 (1994), both of which define probable cause in the context of civil proceedings. In Lindenman, the Kansas Supreme Court defined probable cause in a malicious prosecution case as "reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining." In Campbell, the Court of Appeals defined probable cause in a will contest as "the existence of evidence . . .which would lead a reasonable person, properly informed and advised, to conclude . . . "

[3] Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198 (1996), *rev. denied* 260 Kan. 991 (1996).

> The courts are to give language of statutes their commonly understood meaning, and it is not for the courts to determine the advisability or wisdom of language used or to disregard the unambiguous meaning of the language used by the legislature.

6. Finally, the results of the drug screen are inadmissable as the record fails to establish beyond a reasonable doubt that the test results were from the sample taken from Mr. Bohannon. The legislature adopted a very strict burden of proof for the admission of drug screen test results. The record establishes that the Via Christi medical laboratory has a procedure it uses in handling test samples and that the paper work prepared by the laboratory's employees was consistent with that procedure. The laboratory's supervisor was the only witness who testified about the laboratory's testing procedures. The individuals who actually handled and tested the sample did not testify. Without the testimony from the various employees who handled and tested the sample, the record fails to establish beyond a reasonable doubt the required chain-of-custody or other facts to prove that the test results were from Mr. Bohannon's sample.

7. Because the results of the drug screen are not admissible and, therefore, not part of the evidentiary record, the record lacks other evidence to reasonably conclude that Mr. Bohannon's injury was contributed to by his use of drugs or alcohol.

8. The parties stipulated that Mr. Bohannon has an 18.05 percent functional impairment to the left upper extremity as a direct result of the December 1997 accident. Therefore, he is entitled to receive permanent partial disability benefits for that impairment as provided by the scheduled injury statute.[4]

9. The Workers Compensation Act provides that a worker is entitled to a maximum of 210 weeks of permanent partial disability benefits for an arm injury.[5] As provided by regulation,[6] the number of weeks of temporary total disability benefits due or payable (16.29) is subtracted from 210 and the resulting number is then multiplied by the functional impairment rating for the arm (18.05 percent). That computation yields 34.96, which is the number of weeks of permanent partial disability compensation that Mr. Bohannon is entitled to receive in this claim.

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[4] K.S.A. 1997 Supp. 44-510d.

[5] K.S.A. 1997 Supp. 44-510d(a)(13).

[6] K.A.R. 51-7-8.

AWARD

WHEREFORE, the Appeals Board modifies the Award dated March 31, 1999, and grants Mr. Bohannon an award for an 18.05 percent permanent partial disability to the left arm.

Dennis Bohannon is granted compensation from Dynamic Drywall and its insurance carrier for a December 10, 1997 accident and resulting 18.05 percent permanent partial disability to the left arm. Mr. Bohannon is entitled to receive 16.29 weeks of temporary total disability benefits at $351 per week, or $5,717.79, followed by 34.96 weeks of permanent partial disability benefits at $351 per week, or $12,270.96, making a total award of $17,988.75, which is all due and owing less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
William L. Townsley III, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director